ABDUL RAHIM ABDUL MANAF

v.

HICOM HOLDINGS BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH JC
[ORIGINATING MOTION NO: R2-25-4-99]
17 MARCH 2004

LABOUR LAW: *Employment - Dismissal - Misconduct - Refusal to obey order for transfer - Whether Industrial Court rejected evidence relevant to issues - Whether chairman had erred in law and acted beyond jurisdiction - Whether dismissal with just cause and excuse*

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Decision of Industrial Court - Dismissal of applicant due to misconduct - Whether Industrial Court rejected evidence relevant to issues - Whether chairman had erred in law and acted beyond jurisdiction - Whether dismissal with just cause and excuse*

This was an application by the applicant for an order of *certiorari* to quash the decision of the Industrial Court holding that the applicant was dismissed with just cause and excuse by the respondent company. The applicant's service was terminated on the ground of misconduct when he refused to obey an order issued by the respondent to be transferred. The applicant, however, contended that the reason for his refusal to go on transfer was actuated by *mala fide* on the respondent's part since the respondent had earlier asked him to resign. The Industrial Court made a finding of fact that the applicant was not asked to resign resulting in the applicant challenging the said award on the ground that the chairman of the Industrial Court ('the chairman') had erred in law and had acted beyond his jurisdiction. The four issues requiring determination were: (i) whether there was material evidence before the Industrial Court that showed that the applicant had been asked to resign by the respondent; (ii) whether there was a failure by the Industrial Court to make a finding in regard to the issue of the delay in making the bonus payment; (iii) whether there was a failure by the Industrial Court to come to the conclusion that the transfer ordered by the respondent was not *bona fide* because there was evidence that the applicant's job function was taken over by other existing officers; and (iv) whether the remedy awarded by the chairman in court with regard to the demeanour of the applicant was tantamount to a personal attack.

Held (allowing the application):

[1] Based on the documentary and oral evidence presented before him, the chairman's failure to properly consider the letter written by the applicant to the respondent entitled "Resignation Letter As Requested" ('YM1') in arriving at the conclusion that the issue of the applicant being asked to resign was raised for the first time during the proceeding, amounted to an error of law that went to jurisdiction as stated in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union.* (p 278 g)

[2] The chairman's failure to make a finding as to whether the delay in making the bonus payment amounted to suppression on the respondent's part constituted an error of law. The chairman allowed an error of law to intrude into his deliberation of the facts and he did so by not making a proper finding on the facts before him. (p 279 h)

[3] The respondent explained that upon the restructuring exercise, the applicant's job responsibility was taken over by another officer in the department as an additional portfolio added to that officer's job function. This was a legitimate act by the respondent. Nonetheless, even if the chairman did not make a finding on this issue, it was not fatal so as to amount to an error of law warranting the interference of this court. (p 280 f-g)

[4] Although the applicant was a self-opinionated and difficult character, this court was not swayed by demeanour alone but remained objective with regard to the evidence available and the facts of the case. The applicant was first asked to resign; hence, the Industrial Court could not consider or admit evidence that was irrelevant to the issues or reject evidence relevant to the issues. As such, his dismissal was without just cause and excuse. (p 281 a-c)

[Award of Industrial Court quashed. Case to be remitted to Industrial Court for assessment.]

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (R) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(foll)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 53 r. 1(2)

For the applicant - Suria Kumar DJ Paul; M/s Mohd Idris & Assocs
For the respondent - Edward Saw Keat Leong; M/s Ng Yook Woon, Andrew TC Saw & Co

Reported by Suresh Nathan

JUDGMENT

Wan Afrah JC:

This is an application by one Encik Abdul Rahim bin Abdul Manaf ("the applicant") for an order of *certiorari* to quash the decision of the Industrial Court in Award no. 107 of 1999. In the said award, the Industrial Court held that the applicant was dismissed with just cause and excuse by the company Hicom Holdings Berhad ("the respondent").

Briefly, the facts of the case are that the applicant's service was terminated on grounds of misconduct for insubordination when he refused to obey an order issued by the respondent to go on transfer. The applicant contended that the reason for his refusal to go on transfer was actuated by *mala fide* on the respondent's part who earlier had asked him to resign.

The issue before the Industrial Court was whether the applicant was asked to resign by the respondent's Vice President of Administration and Human Resources. Upon hearing the case, the Industrial Court made a finding of fact that the applicant was not asked to resign. In the award, the learned Chairman of Industrial Court concluded as follows:

> Mahkamah selepas mendengar penghujahan memberi keputusan lisan bahawa pekerja tidak berjaya membuktikan bahawa pertukarannya adalah tidak jujur oleh sebab syarikat telah memintanya meletakkan jawatannya sebelum itu. Mahkamah mendapati di atas pertimbangan kemungkinan SSI tidak ada meminta pekerja meletakkan jawatannya sebelum dia ditukarkan.

Thereafter, the applicant challenged the said award wherein he stated the Chairman of the Industrial Court had erred in law and had acted beyond his jurisdiction. The applicant, in his statement under O. 53 r. 1(2) presented nine grounds to quash the Industrial Court's decision. However, when both counsel appeared before me, the applicant's counsel sought this court's indulgence to re-examine the award and make a decision pertaining to four issues only.

(i) There Was Material Evidence Before The Industrial Court To Show That The Applicant Was Asked To Resign By The Respondent Company's Vice President

The issue whether the applicant was asked to resign remains the crux of the case and necessitates that the court study both documentary and oral evidence critically. To disturb the findings of fact and decision of the earlier court, one would have to be more critical and analytical.

Counsel for the applicant drew me to the material evidence, which is the letter (memorandum dated 15 April 1996) written by the applicant and addressed to the respondent. The letter was titled: "Resignation letter as Requested" (exh. YM1). The applicant's counsel argued that the Chairman of the Industrial Court did not put any weight to the evidence that the applicant was asked to resign.

To my mind, the title of the said letter and the first paragraph that follows does imply that the applicant had been coaxed into resigning. The conversation held earlier between both parties must have given cognizance to the applicant to cause him to have titled the said letter as such, and express his reaction to the demands made by the respondent. I took note that the rest of the content of the said letter did not explicitly refer to the subject matter wherein, the applicant was just patting himself on the back as to the importance of his position and his past successes. Nonetheless, it appears to me that the title of the said letter was sufficient to suggest that the applicant was asked to resign.

Interjecting in my mind was the question whether the applicant in writing the said letter wrongly connoted what the respondent had informed him about the restructuring and consolidation exercise that the company was undergoing. The respondent's counsel pointed out that the applicant had, in the court proceedings, stated that "Benar bahawa tanggapan saya ialah SS1 suruh saya letak jawatan". The malay word "tanggapan" in literal translation to English is "assume". Could it have been the wrong assumption or impression on the applicant's part to think that he was asked to resign? Or was it the case of the wrong word used without much care and thought?

Nonetheless, I am inclined to consider the material evidence in question, ie, the said letter, in determining whether the applicant was asked to resign.

A point to ponder, if it was true that the respondent did not ask the applicant to resign, why didn't the respondent reply to the latter's letter. In my view, the inaction, on the respondent's part to not rebut the applicant's said letter immediately, does suggest that he agreed to having made the request that the applicant to resign.

Counsel for the respondent submitted that it was the applicant's burden to prove that he was asked to resign when the respondent had vehemently denied the same. Respondent's counsel pointed out that based on the evidence before it, the Industrial Court had to make a decision as to whether to believe the applicant or SS1 (the respondent) and it made a finding of fact that on the balance of probabilities, SS1 did not ask the applicant to resign and had given its reasons for doing so. At p. 13 of the award, the learned Chairman of the Industrial Court found:

> Dalam menimbangkan isu ini Mahkamah bertanyakan yang mana lebih mungkin di antara pendirian kedua belah pihak yang bertentangan itu. Adakah lebih mungkin SS1 tidak meminta pekerja meletakkan jawatan atau sebaliknya. Di atas pertimbangan kemungkinan dan mengambil kira keterangan yang telah disebutkan di atas adalah lebih mungkin SS1 tidak pernah meminta pekerja meletakkan jawatannya. Pada pendapat Mahkamah pekerja salah anggap bahawa arahan bertukar itu adalah tawaran yang boleh ditolaknya. Setelah mendengar keterangannya dan meneliti surat-suratnya mahkamah berpendapat pekerja juga adalah seorang yang susah untuk bermuafakat dan mengikut perintah dan mempunyai pendapat sendiri bahawa dia adalah seorang yang sangat pandai. Sebagai perbandingan mahkamah mendapati SS1 adalah saksi yang jujur dan boleh dipercayai terutamanya tentang sebab pekerja ditukarkan. Mahkamah payah untuk bersetuju dengan peguam bijaksana pekerja bahawa SS1 menggunakan pertukaran pekerja sebab helah untuk memberhentikannya. Mahkamah tidak nampak apa sebab SS1 hendak menganiaya pekerja.

Therefore, according to the respondent's counsel, the Industrial Court cannot be accused of having committed an error of law or that it had acted in excess of jurisdiction when it was the applicant's fault for not adducing cogent and corroborated evidence to prove this purported "request for resignation" that he deemed so important to his case.

I do agree with learned counsel for the respondent that it is trite law that findings of fact made based on the credibility of witnesses are not open to review in judicial review proceedings as stated in the *Airspace Management Services Sdn Bhd v. Col (R) Harbans Singh a/l Chingar Singh* [2000] 4 CLJ 77. However when the Industrial Court in its findings of fact, failed to scrutinize the letter (memorandum) YM1, the court is thus duty bound to review such a finding.

To further prove the applicant's case, the applicant's counsel stated that apart from the first letter, there was other documentary proof, indicating that it was true that the applicant was asked to resign. Reference was made to the applicant's subsequent letters (memorandums dated 30 May 1996 and 27 June 1996) in response to the transfer letter issued by the respondent. The applicant declined to accept the transfer relating to the "proceeding" events (to be read as "preceding").

Equally in another letter (memorandum dated 6 July 1996), and in response to the show-cause letter issued by the respondent, the applicant clearly expressed in paragraph three of his letter as follows; (p. 108):

> I am of the opinion that your present actions are nothing more than a ruse to unlawfully terminate my services after failing to persuade me to resign voluntarily.

In the domestic inquiry that followed, the applicant raised the point that he was asked to resign. Reference was made to p. 123 and in the summary of findings at p. 171 para. 2.7(c). The applicant also maintained that he was asked to resign in the Industrial Court.

In citing the evidences above, counsel for the applicant was disturbed when the Chairman of the Industrial Court stated in the award that he agreed with the respondent's counsel that the issue of whether the applicant was asked to resign was first raised in the Industrial Court's proceedings and that the court did not believe the applicant (claimant). To this end, the applicant's counsel submitted that the Industrial Court had acted unreasonably and was erroneous in coming to such a perverse decision.

I am equally puzzled by such a statement from the Chairman of the Industrial Court who failed to take note of the documentary and oral evidence presented before him, to the effect that it was the first time the issue was raised. Also, I cannot agree with the respondent's counsel explanation in his written submissions justifying the Chairman of the Industrial Court's statement that it was of the opinion that it was an afterthought because YM1 (the letter) did not specifically allege that the applicant was asked to resign and that it was written after he was asked to go on transfer.

Based on the above, the failure by the Chairman of the Industrial Court to properly consider YM1 in arriving at the conclusion that the issue that the applicant was asked to resign was raised for the first time during the proceeding would amount to an error of law that goes to jurisdiction as stated in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748. In this particular case, it was held that:

> It was neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said than an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or mis-applies or mis-sates a principle of the general law.

(ii) Failure By The Industrial Court To Make A Finding In Regard To The Issue Of The Delay In Making The Bonus Payment

In relation to and in support of the applicant being asked to tender his resignation, counsel for applicant pointed out to me the relevant part of the statement of case wherein the issue of the respondent's wilful delay in releasing bonus payment was raised. The applicant alleged that when he refused to resign, the respondent deliberately withheld his bonus and sidelined his assignments and duties. The applicant's counsel argued that the Industrial Court did not make a finding of fact that his client had been victimised and harassed by the respondent to force him into agreeing to resign.

Perusing the award, I noted that the Chairman of the Industrial Court merely acknowledged the respondent's reason for delay in the bonus payment as an administrative problem. True enough, the Industrial Court did not make a finding and was silent on this particular issue in relation to what was alleged by the applicant as against the respondent.

At this juncture, there seems to be an act of *mala fide* by the respondent towards the applicant. However, it would have satisfied me further had counsel for the applicant asked the important question of whether the delay in making the bonus payment was limited solely to the applicant or whether it affected all the respondent's employees across the board.

In my view, although the bonus was paid prior to the transfer order which supports that fact there was no intended act of victimization against the applicant, but the respondent's sincerity is put into question. The applicant, during evidence in chief complained that; "Gaji saya dibayar semula. Bonus saya disekat. Selepas saya ugut melalui peguam, saya dibayar bonus melalui cek. Selalunya bayaran dibuat terus ke akaun bank. Ini bukan suatu kebiasaan." Clearly, only upon the applicant's threat did the respondent pay the bonus to the applicant. The non-conventional manner of the bonus payment gave me bad vibes as against the respondent.

Here, I noted that counsel for the applicant failed to challenge and cross-examine the respondent's witness as to the underlying reasons why the payment of bonus was delayed. My observation is that he just dribbled the ball but did not score the goal. Thus, it is left for me to draw my own conclusion from the evidence and arguments that were put before me. To my mind, the failure by the Chairman of the Industrial Court to make a finding as to whether the delay in making the bonus payment amounted to suppression on the respondent's part constitutes an error of law. In this case, the Industrial Court allowed an error of law to intrude into his deliberation of the facts and he did so by not making a proper finding on the facts before him.

(iii) Failure By The Industrial Court To Come To The Conclusion The Transfer Ordered By The Company Was Not Bona Fide Because There Was Evidence To Show That The Claimant's Job Function Was Taken Over By Other Existing Officers

The applicant also contended that the transfer order was not *bona fide* because his job function was handled by another junior officer in the company as stated in his statement of case.

However, it was narrated by the respondent's counsel that there was a take-over of ownership in the company. Thereafter, the company was desirous of revamping its organisational structure to be more effective, manageable and profitable. A new organization chart was drawn and job functions in various departments were streamlined. According to the respondent, some employees were relocated to various subsidiary companies within the group, whilst others chose to resign of their own accord.

In applicant's case, he was directed to be transferred to a subsidiary company within the group to fill up a position not less favourable than his current status. To meet the changes ensuing from restructuring exercise the application's job function was reassigned to another officer who was placed with additional job responsibilities.

The applicant, at the Industrial Court stage, did not at all challenge the *bona fides* of this restructuring exercise and neither did he lead any evidence during his examination in chief or cross-examination to show that the restructuring exercise was conducted in a *mala fide* intent by the respondent. Therefore, the Industrial Court was entitled to assume that the restructuring exercise was *bona fide*.

I am satisfied with the respondent's explanation that upon the restructuring exercise, the applicant's job responsibility was taken over by another officer in the department as an additional portfolio added to that officer's job function. This was a legitimate act by the respondent.

Nonetheless, even if the Chairman of the Industrial Court did not make a finding on this, this issue to my mind, is not fatal so as to amount to an error of law warranting the interference of this court.

(iv) The Remedy Awarded By The Chairman In Court With Regard To The Demeanor Of The Claimant Was Tantamount To A Personal Attack

The demeanor of a person plays an important role in any court's decision. It helps the court in determining the matter, whether favourably or unfavourably of in the circumstances of each individual case. However, the court must not loose sight of the issues at hand, the evidence as well as the facts of the case.

Looking into the applicant's letters (memorandums) I agree with the Chairman of the Industrial Court's statement as to the applicant's personality and conduct which was that the applicant was a self-opinionated and difficult character. Nonetheless, I am not swayed by demeanour alone but remain objective with regard to the evidence available and the facts of the case.

In conclusion, I return to the crux of the case, ie, whether the applicant was first asked to resign. I verily believe he was asked to do so. Hence, I reiterate my reliance on *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union* [1995] 2 CLJ 748 and on the principle enunciated in *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 that the Industrial Court cannot consider or admit evidence that is irrelevant to the issues or reject evidence relevant to the issues. As such, his dismissal was without just cause and excuse.

I hereby quash the Industrial Court Award with costs. As to the quantum, I take note that although a figure of salary was pleaded, no evidence was led in the Industrial Court. As such, I hereby order that this case be remitted to the Industrial Court for assessment.